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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 CLIFFORD S. MASS,

4 Plaintiff,

5 v.

18 Civ. 2239 (GBD)

6 GREG COHEN PROMOTIONS, LLC, *et*
7 *al.*,

8 Defendants.

Argument

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9 New York, N.Y.
10 October 18, 2018
11 11:15 a.m.

12 Before:

13 HON. GEORGE B. DANIELS,

14 District Judge

15 APPEARANCES

16 CULLEN and DYKMAN LLP

Attorneys for Plaintiff

17 BY: DOUGLAS J. BOHN

18 KUDMAN TRACHTEN ALOE LLP

Attorneys for Defendants

19 BY: DAVID N. SAPONARA

GARY TRACHTEN

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(Case called)

MR. BOHN: Good morning, your Honor. Douglas Bohn, Cullen and Dykman, on behalf of the plaintiff.

THE COURT: Good morning, Mr. Bohn.

MR. TRACHTEN: Good morning. Gary Trachten, from Kudman Trachten Aloe, for the defendant. My colleague David Saponara who will be arguing the case for the defendant.

THE COURT: Good morning.

Mr. Saponara, before we start let's focus on the issues. It is my understanding that you are voluntarily withdrawing the breach of implied covenant of good faith and fair dealing, Count Three; conversion, Count Four; the unjust enrichment, Count Seven; and the specific demand for an accounting in Count Eight.

Is that correct?

Do I have that correctly?

MR. BOHN: Yes, your Honor. Douglas Bohn on behalf of plaintiff.

THE COURT: I'm sorry, Mr. Bohn.

MR. BOHN: That's quite all right.

Your Honor, yes, we had spoken a bit with the defendant and also heeded the Court's suggestions at the initial conference. So what we really have done here is we've streamlined this matter. There is no challenge, as the Court is aware, to the breach of contract --

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1 THE COURT: Right.

2 MR. BOHN: -- and the failure to pay wages, which is
3 Counts One and Two. In essence, your Honor, we're basically
4 here on the fraud claims.

5 THE COURT: Let me make sure I understand.

6 At this point, the way the complaint is written, those
7 counts are only against the corporation?

8 MR. BOHN: No, your Honor. Those counts are against
9 both.

10 THE COURT: OK. That's what I am trying to
11 understand.

12 MR. BOHN: Yes, your Honor.

13 THE COURT: It wasn't clear to me in the papers.
14 We'll get to that.

15 Also, my understanding is -- and we can have further
16 discussion -- that leaves basically Counts Five and Six and I
17 forget which of the other counts. The count for attorney's
18 fees I guess is Count Ten and then there's another count for
19 piercing the corporate veil.

20 MR. BOHN: Which is Count Nine, your Honor.

21 THE COURT: Right. It seems to me, unless you
22 disagree, those two counts are not substantive counts.

23 MR. BOHN: Yes. Correct, your Honor, obviously.

24 THE COURT: So those go to remedies.

25 MR. BOHN: Yes.

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1 THE COURT: My position would be, unless you want to
2 argue further, that I would dismiss those as separate counts
3 without prejudice to you to demonstrate obviously if you are
4 the prevailing party in this lawsuit that you are entitled to
5 the attorney's fees per the contract, and if you can
6 demonstrate that there is a basis for piercing the corporate
7 veil in terms of enforcing the judgment, that you have the
8 right to do that.

9 Although, given the way the parties have laid out that
10 there's a company, that your client worked for the company,
11 that your client still works for the company, that there are
12 other employees of the company that this is a significant
13 amount of business being generated by the company, I don't see
14 any specific allegations here in this complaint that would
15 support piercing the corporate veil and saying somehow this is
16 a sham company and that he is in fact the company and so,
17 therefore, any liability should be personally his.

18 But that is not an issue that needs to be resolved at
19 this point. If you obtain a judgment against the company and
20 you think you have a right to enforce against him because he is
21 the company, then you can pursue that judgment.

22 MR. BOHN: Yes, your Honor. We do agree with the
23 Court's initial position that Counts Nine and Ten can be
24 withdrawn or discontinued with prejudice to address those
25 points later. To your Honor's latter point, we respectfully

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1 await further proceedings to argue the piercing issues, but,
2 yes, ultimately we do agree that those are not issues for
3 today.

4 THE COURT: All right.

5 So then I guess what we really need to concentrate is
6 on the fraudulent misrepresentation claim and the actual fraud
7 claim, Counts Five and Six.

8 MR. BOHN: Yes, your Honor, we agree.

9 THE COURT: Mr. Saponara, let me turn to you then.

10 MR. SAPONARA: Yes.

11 THE COURT: First of all, is it your understanding --
12 I don't have a recollection, but is it your understanding that
13 Counts One and Two are counts alleged against both defendants?

14 MR. SAPONARA: That's not my understand being.

15 THE COURT: That's why I asked. That wasn't my
16 understanding either.

17 MR. SAPONARA: If you flip to the plaintiff's
18 opposition brief at footnote 7 --

19 THE COURT: You have to speak up. Pull the microphone
20 closer to you, or you can go to the podium.

21 MR. SAPONARA: To go to the plaintiff's opposition
22 brief at page 12, footnote 7, they clarify the breach of
23 contract and wage claims are not subject to this motion to
24 be --

25 THE COURT: Slow down. And you will have to speak

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1 louder.

2 MR. SAPONARA: Sorry.

3 The breach of contract and wage claims are not subject
4 to the motion, but he clarifies that, paragraph 12 says the
5 complaint is clearly between GCP and Mr. Mass, and that
6 Mr. Mass is an employee of GCP.

7 THE COURT: Where are you quoting from?

8 MR. SAPONARA: This is the plaintiff's opposition
9 brief at page 12, footnote 7.

10 THE COURT: The footnote, OK.

11 Paragraph 12 of the complaint clearly states GCP and
12 Mr. Mass entered into an investment agreement. Furthermore,
13 paragraph 25 states Mr. Mass is also an employee of GCP.

14 Well, before we begin, then let me turn back to Mr.
15 Bohn.

16 MR. BOHN: Yes.

17 THE COURT: Mr. Bohn, I just want to make sure I
18 understand technically your position. Is your position that
19 these two claims are alleged against him individually because
20 he is a party to the contract, or that just based on your
21 theory that you wish to pierce the corporate veil?

22 MR. BOHN: No, your Honor. And we agree with counsel.
23 Counts One and Two are necessarily and only asserted against
24 the corporation. We recognize that the corporation entered
25 into the contract with Mr. Mass, and we recognize that the

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1 corporation was obligated to pay his wages. We do not contend
2 that Counts One and Two are being made against Mr. Cohen. We
3 do allege that the fraud-based claims are.

4 THE COURT: OK. That's fine. OK.

5 The question really is, if the fraud claims do go
6 away, is there a claim against Mr. Cohen personally?

7 MR. BOHN: Other than perhaps enforcement along the
8 piercing line that your Honor brought up, no, there would not
9 be a remaining direct count against Mr. Cohen. We recognize
10 that.

11 THE COURT: OK. So let's concentrate then on the
12 fraud claims.

13 MR. SAPONARA: Sure.

14 So the fraud claim is purely duplicative of the breach
15 of contract claim.

16 If you look at the operative allegations in the
17 complaint here -- that's paragraphs 81 and 86 -- this is the
18 only allegation in the complaint that talks about a specific
19 representation that Mr. Cohen alleged to have made and that
20 Mr. Mass is alleged to have relied on in entering into the
21 investment agreement.

22 It says that Cohen acted on behalf of GCP falsely, and
23 in paragraph 81 and 86 it says fraudulently represented that 25
24 percent of the promotional profit, for the purpose of returning
25 the 250,000 investment for Mr. Mass --

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1 THE COURT: Excuse me. I have to interrupt you.

2 You are going to have to talk much louder and much
3 slower.

4 MR. SAPONARA: Sorry. OK.

5 Paragraphs 81 and 86, this is the only representation
6 that Mr. Cohen is alleged to have made prior to Mr. Mass
7 entering into the contract.

8 It says that Mr. Cohen represented that 25 percent of
9 the promotional profits, parens, for the purpose of returning
10 the \$250,000 investment for Mr. Mass and an additional 5
11 percent of the promotional profits as payment on Mr. Mass'
12 financial interest in the promotional profits would be paid to
13 Mr. Mass for each event.

14 This is the exact same promise that GCP made in the
15 investment agreement. It's plainly its only obligation under
16 the investment agreement.

17 So what the plaintiff is trying to do here is take its
18 breach of contract claim against GCP and turn it into a fraud
19 claim against Mr. Cohen. That is improper for two reasons:
20 Number one, it makes it duplicative of the breach of contract
21 claim; and, number two, this allegation is plainly insufficient
22 to implicate any of the elements of fraud and certainly not
23 with the particularity that's required under Rule 9(b).

24 THE COURT: Well, I am not sure I understand the
25 duplicative argument, since there is no contract with

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1 Mr. Cohen.

2 MR. SAPONARA: I guess now that it's clear that they
3 are not alleging the fraud claim in addition to the breach of
4 contract claim against the company, I guess the duplication
5 argument can go by the wayside. But it still has not -- this
6 allegation and the rest of the allegations in the complaint are
7 not sufficient to state a fraud claim against Mr. Cohen
8 individually.

9 In his opposition, Mr. Mass argued that he has claims
10 and damages which were independent of this obligation under the
11 contract. But there's no other representations alleged in the
12 complaint. There's no allegation that Mr. Cohen told him I had
13 these boxers on my roster and that wasn't true or that I had
14 these events lined up and that that wasn't true. The only
15 precontract representation that is alleged in the complaint is
16 that GCP will pay what it's supposed to pay under the contract.

17 They cite a number of different cases talking about
18 instances where a fraud claim can be stated based on
19 nonperformance of the contract, but all of the -- or based on
20 inducing someone to enter into a contract. All of those cases
21 relate to collateral representations. So, I've got orders in
22 hand, a statement of a present fact that proved not to be true
23 that the plaintiff relied on.

24 That's not the case here. There's no present fact
25 allegations. The only allegation is that GCP is going to

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1 perform under the agreement. That is a statement of future,
2 and all it leaves is a breach of contract case against GCP.
3 It's not enough to state a fraud claim against Mr. Cohen
4 individually.

5 THE COURT: Is Mr. Mass still an employee of this
6 company?

7 MR. SAPONARA: He is not.

8 THE COURT: He was employed for what period of time?
9 He was an employee at the time the complaint was filed?

10 MR. SAPONARA: No. I think he resigned in, I think
11 it's January 2018.

12 THE COURT: OK.

13 MR. SAPONARA: He became employed about a month after
14 the investment agreement, so that would be April of 2015.

15 THE COURT: I'm sorry. Give me that one more time.

16 He was employed for what period of time?

17 MR. SAPONARA: From April of 2015 until January 2018.

18 THE COURT: All right. The complaint was filed when?

19 MR. BOHN: Your Honor, I think I can clarify. He was
20 employed at the time that the complaint was filed. He resigned
21 thereafter, in February.

22 THE COURT: That's what I thought.

23 MR. BOHN: Yes, your Honor.

24 MR. SAPONARA: It was in February.

25 THE COURT: He was employed when this complaint was

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1 filed on January 31, 2018, or I assume somewhere around that.

2 MR. SAPONARA: The stamped date February 5, 2018. It
3 might be dated January.

4 THE COURT: Yes. The complaint with Mr. Bohn's
5 signature is January 31, 2018.

6 All right. So there was a relationship with the
7 company, an employment relationship with the company and
8 obviously some personal relationship with Mr. Cohen from March,
9 or even before that, but at least March of 2015 through January
10 of 2018 when the complaint was filed?

11 MR. SAPONARA: Yes.

12 So the complaint doesn't give any background of prior
13 to March 10, 2015, when the corporate defendant and Mr. Mass
14 entered into the investment agreement.

15 So, whether or not there is any history, there's no
16 allegations here that say what that history is or what the
17 negotiations of the contract were or anything leading up to
18 signing the contract.

19 THE COURT: My understanding, if I have it correctly,
20 is that the allegations of the complaint don't cover a period
21 beyond December of 2017?

22 MR. SAPONARA: That's correct.

23 THE COURT: I think I have paragraph 65 that says for
24 the time period of April 2015 through December 2017 Mr. Mass is
25 entitled to salary of \$135,000?

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1 MR. SAPONARA: That's correct.

2 THE COURT: Go ahead. You can continue with your
3 argument, I interrupted, with regard to the fraudulent
4 inducement, fraudulent misrepresentation -- it's really alleged
5 as a fraudulent inducement.

6 MR. SAPONARA: Yes. It comes back to the sole
7 allegation that Mr. Mass alleges that he relied on in entering
8 into this transaction was that Mr. Cohen told him GCP would
9 perform its obligations. That is not enough here.

10 Mr. Mass in his opposition tries to point to a number
11 of different, quite frankly, inflammatory allegations that are
12 in the complaint, but they have nothing to do with his decision
13 to enter into the contract.

14 It's all, if you look carefully at it, so-called acts
15 of bad faith and malfeasance in terms of failing to pay
16 corporate debts or the use of corporate funds for personal
17 expenses. These are all specifically alleged in paragraph 53
18 to have occurred after March 2015.

19 THE COURT: Well, I wasn't quite sure. There was a
20 possibility of some overlap. Where are you pointing me to.
21 Which paragraph?

22 MR. SAPONARA: Paragraph 53.

23 THE COURT: I can verify that with Mr. Bohn, but 53
24 says --

25 MR. SAPONARA: It says, Upon information and belief,

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1 in addition to the allegations set forth above, since March of
2 2015 --

3 THE COURT: Right.

4 MR. SAPONARA: -- Cohen has made numerous material
5 misrepresentations and others concerning his business and
6 committed numerous acts of bad faith and malfeasance.

7 If you look down at the subparagraphs, none of those
8 are representations. Even if they were, they were post
9 inducement, alleged inducement for representations that --

10 THE COURT: My recollection is that the agreement was
11 signed, I mean he doesn't allege it previously, but the
12 agreement was signed March 10, 2015.

13 MR. SAPONARA: Yes. This allegation is since March of
14 2015.

15 THE COURT: Right. So that could be since March 1.

16 MR. SAPONARA: I think it Rule 9 requires a little
17 more specificity.

18 THE COURT: I understand that. But "since March"
19 doesn't necessarily mean that every allegation or every fact
20 happened after March 10. That may be the case, and it's not
21 alleged that it even happened after March 10, and we can
22 discuss that.

23 MR. SAPONARA: But he's not alleging that he relied on
24 any of these representations. Even if we are going to assume,
25 which is not in the complaint, that something happened between

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1 March 1 and March 10, if you go to paragraph 82, the
2 representation that Mr. Cohen is alleging that he relied on is
3 the representation in 81. Again, that goes back to the
4 representation that GCP is going to perform under the contract.

5 THE COURT: Yes. But in terms of timing, I assume
6 that that was a representation that was made before they signed
7 a written contract.

8 MR. SAPONARA: It is a promise to perform. It is a
9 promise that GCP is going to perform.

10 THE COURT: I understand. That is a separate
11 argument.

12 MR. SAPONARA: I think it is a reasonable inference.

13 THE COURT: It is a separate argument as to whether or
14 not that would constitutes a separate fraud. I understand that
15 argument, but your timing argument, I think that it is clear
16 that promises that are usually in a written agreement are
17 usually made and understood by the parties before they sign the
18 written agreement.

19 MR. SAPONARA: Yes. I agree that this representation,
20 if you are going to read this, this is the only representation
21 that is alleged prior to them signing the contract. I agree
22 with that.

23 THE COURT: OK.

24 MR. SAPONARA: One final point. The damages that he
25 is seeking here are the exact same damages for GCP's breach of

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1 the contract. There's nothing that distinguishes this claim
2 from the breach of contract except that it's an attempt to put
3 Mr. Cohen in on personal liability, which I think we all now
4 agree he can't do under a veil-piercing theory, so this is the
5 only remaining hook to try to bring Mr. Cohen into this case,
6 which we think is inappropriate under the --

7 THE COURT: Two questions I have for you, and then I
8 also have for the other side. One is, what, to your
9 understanding, is the difference between Count Five and Count
10 Six.

11 MR. SAPONARA: That's a good question. I would like
12 to hear Mr. Bohn's answer to it. I didn't write this pleading.
13 I think they're certainly duplicative of one another, and the
14 allegations are nearly identical. In the briefing there's no
15 distinguishing between just general case law discussing common
16 law fraud in New York or what these are termed as, fraudulent
17 misrepresentation and actual fraud.

18 THE COURT: All right.

19 What about the whole discussion about which counts
20 were in and were out. There is still a factual allegation with
21 regard to this \$14,000 loan. I am not quite sure where it fits
22 in now or whether or not it is within a count.

23 MR. SAPONARA: I think it is pled within the breach of
24 contract count, but we explain in our papers why we think that
25 count is not sufficiently stated.

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1 THE COURT: There would have to be a separate breach
2 of contract count against Cohen, because that's not just the
3 GCP count.

4 MR. SAPONARA: Correct.

5 THE COURT: That's not Count One or Count Two.

6 MR. SAPONARA: Yes.

7 THE COURT: I think it is alleged now as the
8 conversion count which has been dropped. I'll ask Mr. Bohn
9 whether or not he intends to proceed against Mr. Cohen on some
10 separate contract theory and allege a breach of contract based
11 on these facts. There is a different question as to whether or
12 not, even though he's dropped the conversion claim, I am just
13 trying to figure out is there any relevance to these facts.

14 MR. SAPONARA: I think, however it's pled or whether
15 it's a separate count or bound up in -- it would have to be a
16 separate count, it's just not a sufficient claim under the New
17 York law, because it's a written -- it's a promise to satisfy
18 the debt of another.

19 THE COURT: I am not sure I understood that, that I
20 agree with that in reading the facts.

21 The facts don't say that there was a contract
22 between -- what is his name?

23 MR. SAPONARA: Mr. Rizzo.

24 THE COURT: Rick Rizzo or something.

25 MR. SAPONARA: Yeah. I agree the complaint is not

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1 very clear.

2 THE COURT: Yes. But the complaint does not say that
3 Rizzo borrowed money from Mass that Cohen is guaranteeing. The
4 way I read the complaint, it says Cohen asked Mass for the loan
5 and assured him that he would be paid back and then told him to
6 wire the money to Rickey whatever his name is.

7 MR. SAPONARA: Rizzo.

8 I think their opposition concedes that this was a loan
9 being made to Mr. Rizzo. When you go to page 16, they talk
10 about they know the payment was made directly to Mr. Rizzo.

11 THE COURT: The payment was made directly to
12 Mr. Rizzo. When I look at the complaint -- and maybe they will
13 concede this, I don't know if they still intend to pursue
14 this -- but if I look at Count Four, it says, paragraph 77
15 says, Additionally Cohen improperly converted the \$14,000 loan
16 extended from Mass to Cohen. It says the loan was extended to
17 Cohen. It doesn't say the loan was extended to Rizzo. I think
18 there was some other language.

19 MR. SAPONARA: I think if you go to the bottom of page
20 16, it says -- he references a text message, "Whatever I do for
21 Ricardo" --

22 THE COURT: I'm sorry. Where are you?

23 MR. SAPONARA: This is the bottom of page 16 of the
24 plaintiff's opposition brief.

25 THE COURT: The brief, OK.

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1 MR. SAPONARA: Just to be clear, in their opposition
2 they don't argue that this is a direct contract. They try to
3 oppose our argument that this is a loan guarantee that needs to
4 be in writing. They don't come back and say this is a direct
5 breach of contract claim against Mr. Cohen for a loan that
6 Mr. Mass gave to Mr. Cohen.

7 So, if you look at the second half of the paragraph,
8 he references a January 2016 text message where plaintiff
9 stated, "Whatever I do for Ricardo, I need March 1." Mr. Cohen
10 replies, "Correct, a hundred percent, signed in blood."

11 That suggests or it shows that plaintiff knew that he
12 was loaning money to Mr. Ricardo. He wasn't giving money to
13 Mr. Ricardo to pay for something as a loan to Mr. Cohen. It
14 wasn't a direct payment of on Mr. Cohen's behalf.

15 THE COURT: You know the circumstances of that
16 transaction and I don't. I see that language, I read that
17 language in the complaint. I mean I read the language in the
18 brief. But I am looking at the complaint, and, one, I don't
19 see any details about this loan, about what it was for and when
20 it was supposed to be paid back, who was supposed to pay it
21 back, what the purpose of it was, none of that. I just see
22 language in this complaint that says that basically says that
23 Cohen asked Mass to send money to Rizzo.

24 I don't see a direct contract between Rizzo and Mass.
25 I see a contract between Cohen and Mass. If you came to me and

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1 said, I need you to send \$14,000 right away to Mr. Bohn, and I
2 said, well, am I going to get paid back? And you say, Yeah,
3 don't worry about it, you will get your money back, just send
4 him the money, wire it to him, and then I wire money to Mr.
5 Bohn, how is that a contract between me and Mr. Bohn?

6 If the money shows up in his account and Mr. Bohn says
7 to me: Well, thanks for the money. I spent it. I am not
8 giving it back to you. I didn't borrow this money from you.
9 This is the agreement that you made with Cohen, not with me.
10 Where's the contract between the person who the money was wired
11 to simply because they were wired the money? That's what I
12 didn't understand in this complaint. It doesn't really say
13 that these guys even had a conversation. It doesn't even tell
14 me they know each other.

15 MR. SAPONARA: I agree this isn't the only situation
16 where there is a lot of detail lacking in the complaint.
17 Obviously things evolved since then, and Mr. Bohn in the
18 opposition has interjected some --

19 THE COURT: You guys must know something I don't. All
20 I know is what is in the complaint.

21 MR. SAPONARA: Sure. I think Mr. Bohn could probably
22 better address what plaintiff's intentions are with this
23 action.

24 THE COURT: Right. Because right now it is not a
25 cause of action --

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1 MR. SAPONARA: Correct.

2 THE COURT: -- a conversion cause of action. Maybe it
3 is a new point.

4 MR. SAPONARA: It was withdrawn and Count One is only
5 against the company.

6 THE COURT: OK.

7 MR. SAPONARA: If there are no other questions, thank
8 you.

9 THE COURT: Let me hear Mr. Bohn with regard to this.

10 MR. BOHN: Thank you, your Honor.

11 Would you like me to use the podium or are you
12 comfortable with me here.

13 THE COURT: I'm comfortable where you are comfortable.

14 MR. BOHN: Thank you very much.

15 A few issues to address right off the bat, your Honor,
16 including counsel's concession that there is no duplication
17 argument left here and that we are really talking about the
18 fraud claim.

19 At the Court's convenience when, it reviews the papers
20 further, in response to his discussion of paragraph 81, I would
21 also direct the Court to paragraphs 82 and 87 when it can
22 review, an allegation is made --

23 THE COURT: Paragraph 82 of the complaint?

24 MR. BOHN: Correct, your Honor. And 87, where the
25 allegation is. It's part of the fraud claim. Separate from

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1 the failure later for GCP or defendants to pay on the contract,
2 the allegation of Mr. Mass is that when that contract was
3 entered there was never any intention of Mr. Mass in order to
4 pay that. The breach comes later. We understand that, in his
5 failure to pay the promotional profits --

6 THE COURT: You would have to concede the law in New
7 York State and almost everywhere, if not everywhere, that if I
8 am going to sell you my car and you say I will give you \$10,000
9 if you give me your car, and you give me \$10,000 and I say to
10 myself, well, that's a quick easy \$10,000 I will agree to that.
11 And I say, OK, let's sign a contract. I'll sell you my car for
12 \$10,000. You give me the \$10,000.

13 That is a lawsuit. Then you say give me the car, and
14 I say you know what, I am not going to give you the car. As a
15 matter of fact, I never intended to give you the car. It is my
16 car. I changed my mind. I don't want you to have it or for
17 whatever reason I say I don't want to give it to you.

18 The law says that your right is under the contract,
19 that you can't say that simply because, as you just
20 articulated, because I never intended to perform the
21 responsibilities and duties and obligations in the contract
22 that that is sueable as a fraud rather than the breach of the
23 promise. There's a good reason for that. Because it doesn't
24 matter whether I intended to give you my car when I signed the
25 contract. The question really comes down to whether I

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1 performed at the time when it became my obligation to perform.

2 If I didn't perform when it became my obligation to
3 perform, I am in breach of contract. And if I am in breach of
4 contract, I can't at the same time say the facts that
5 constitute my breach of contract, the exact same facts that
6 constitute my breach of contract is somehow a separate claim
7 for fraud.

8 The court says, well, no, you have a contract. That's
9 why you have a contract. You have that promise, and you get to
10 enforce that promise.

11 There's no allegation here that there wasn't a
12 contract or somehow some promise outside of the contract was
13 made that caused my damage. The only thing that caused the
14 damage is, it seems to me, that what you say paragraph 81 seems
15 to be the sole representation that you claim was fraudulent.

16 MR. BOHN: No, not necessarily.

17 THE COURT: So what other paragraph is the substance
18 of the promise or the representation that was made that you say
19 was the fraudulent misrepresentation.

20 Let me be more specific. You say that Cohen falsely
21 represented that 25 percent of the profits and an additional 5
22 percent of the promotional profit would be paid to Mass. And
23 that's what was put into the contract.

24 OK. So that's the exact promise that was in the
25 contract. I don't see any other promise that was made that you

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1 allege other than the promise that's in the contract that you
2 say induced Mr. Mass to sign the contract.

3 MR. BOHN: Two points, your Honor.

4 First, earlier on, counsel made reference to, I
5 believe it's 52 and 53, and that was how the funding was used
6 as alleged -- obviously we are at the pleading stage and the
7 pleadings if they're facially valid are to be accepted -- that
8 the money was used directly for other purposes and the
9 allegation --

10 THE COURT: I'm sorry. Slow down. What paragraph are
11 you referring to?

12 MR. BOHN: 52 and 53.

13 THE COURT: It can't be 52.

14 MR. BOHN: I'm sorry, your Honor. 53 and 54; 55 and
15 56. We mention these in our papers.

16 THE COURT: Wait a minute. You have to slow down now.
17 53 and 54?

18 MR. BOHN: Yes, your Honor.

19 THE COURT: That spills over into my question about
20 what the difference is between these two counts.

21 What is in 53, what specific factual representation
22 that you say was made to your client that your client relied
23 upon that's in 53 or 54?

24 MR. BOHN: The use of the funds --

25 THE COURT: Well the use of the funds is not a

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1 representation.

2 MR. BOHN: Well, it was Mr. Mass's understanding that
3 the funds would be invested into the company itself and
4 utilized by the company itself in order to get to the very
5 essence of what his investment was.

6 THE COURT: So what was the material misrepresentation
7 that you are alleging in these paragraphs?

8 MR. BOHN: Well, that this money was not used as an
9 investment in the company.

10 THE COURT: OK. But you just can't say it that way,
11 because that is not a representation. So tell me what is the
12 material representation that he relied upon that you say was
13 the false statement that was made to him? Show me the
14 language. Quote it to me in the --

15 MR. BOHN: I cannot quote you exact language, your
16 Honor.

17 THE COURT: But don't you need that? You need a
18 misrepresentation of fact. You need to say that he told me X
19 and, in reliance on that, I did Y. I'm missing the X.

20 MR. BOHN: I understand, your Honor.

21 THE COURT: Because the fact that he used it to pay
22 tuition for his family may be some sort of violation, but that
23 in itself is not a fraud because that in and of itself had
24 nothing to do with why your client signed the agreement, and he
25 made no representations about whether he was going to pay the

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1 tuition of his family. That may be some kind of theft of the
2 company or it may be some kind of misuse of company funds. It
3 may be the company may have some recourse against him and the
4 investors in the company may have a recourse against him. But
5 because he's done bad things, because he used money in the
6 company for his own personal entertainment, that doesn't
7 explain to me how this has anything to do with defrauding
8 Mr. Mass by making some representation to him that caused his
9 damages.

10 MR. BOHN: I understand, your Honor. I do agree,
11 acknowledge that a reasonable interpretation of the claims
12 needs to be made here.

13 THE COURT: What is the interpretation? What is it
14 that you think that you can allege further that your client
15 claims that was a material misrepresentation other than your
16 statement, which is consistent with paragraph 81, that when he
17 signed the contract and promised to give him these profits that
18 he never intended to give him these profits?

19 Other than that, what is it that your client was told
20 by Mr. Cohen that made your client either sign the contract or
21 made your client lose additional money other than your damages
22 under the contract?

23 MR. BOHN: Two responses, your Honor. The reasonable
24 interpretation that I am speaking of is that when Mr. Mass made
25 the investment of \$250,000 into the company --

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1 THE COURT: Right.

2 MR. BOHN: -- to grow the company.

3 THE COURT: Right.

4 MR. BOHN: That the funds would be used for the
5 benefit of the company. That's the reasonable interpretation I
6 was speaking of.

7 THE COURT: Why is that a reasonable interpretation?
8 Who cares what the money was used for? You wouldn't say that
9 somehow it affects the obligations and rights of the two people
10 who signed the contract depending on what the money was used
11 for.

12 You would still say I don't care if he went to
13 Disneyworld with the money I gave him \$250,000, and he promised
14 me that he would have a percentage of the profits of the
15 company. What difference would it make whether he went to
16 Disneyworld on your money, as long as you got what you
17 bargained for?

18 MR. BOHN: That's one of the problems here, your
19 Honor. We haven't gotten it.

20 THE COURT: Right. The question is why didn't you get
21 it. You didn't get it because they breached the contract.
22 That's what you claim.

23 MR. BOHN: Our claim is that the belief that the money
24 would be used in -- I don't know. That's the point of
25 discovery. I don't know if the use of this money into the

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1 company would have been better used.

2 THE COURT: What difference does it make? What
3 difference does it make to his obligation to pay your client.

4 MR. BOHN: Because there was the understanding of our
5 client -- and I understand, your Honor, if your Honor believes
6 as a matter of law that that's insufficient, I understand that,
7 your Honor.

8 THE COURT: I am just trying to understand. I am also
9 trying to understand who this claim is against. Are you trying
10 to assert this claim against both or just Mr. Cohen.

11 MR. BOHN: We would concede that this is against
12 Mr. Cohen.

13 THE COURT: OK.

14 MR. BOHN: I would also like to add another item.
15 Your Honor put it very well before, where you said for the most
16 part typically before a written agreement is entered into there
17 are discussions had. There is another example where we base
18 these claims on, and that would be of what's called the GCP
19 roster, which is the list of the fighters, which was ultimately
20 later on made part of the agreement.

21 THE COURT: Right.

22 MR. BOHN: And which Mr. Cohen indicated this in
23 essence was my stable. This is my stable of fighters.

24 THE COURT: All right.

25 MR. BOHN: Our understanding at this point is that is

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1 not true. We asked in informal -- we won't get into discovery
2 issues, that is ongoing. We asked in informal discovery, and
3 we didn't get, we said, hey, give us all your promotion
4 agreements for everybody on your roster, because as your Honor
5 very, very well said, the discussions were had before. They
6 were had over dinner I understand. But the representation
7 before entry into the contract included, hey, these are my
8 fighters. It is a substantial list, your Honor.

9 THE COURT: OK.

10 MR. BOHN: We are alleging that those individuals at
11 that point -- and we still need discovery on it -- were not
12 part of GCP, were not under contract with GCP.

13 If Mr. Mass is entering into a contract, OK, and the
14 promotional profits, which is alleged here, and the definition
15 in the agreement talks about the roster, it's part of it. It
16 is part of the forms of the contract where, OK, here are these
17 fighters.

18 THE COURT: But that is not articulated in the
19 contract you are saying?

20 MR. BOHN: The definition of promotional profits and
21 the --

22 THE COURT: Right.

23 MR. BOHN: -- basis for entering into the contract
24 prior, the definition of promotional profits includes and
25 references the roster.

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1 THE COURT: OK.

2 MR. BOHN: Obviously Mr. Mass is going into this
3 agreement saying, OK, if your fighters make money GCP fighters
4 make money, then I get paid. Who are the fighters? That's the
5 essence of what that agreement is. That is an inducement.

6 THE COURT: I'm trying to figure out what your
7 additional damages are other than the damages that you are
8 seeking in contract?

9 MR. BOHN: The additional damages is we don't know
10 what the end number on the damages is because we need to know
11 which of these fighters were on roster or not on roster --

12 THE COURT: Right.

13 MR. BOHN: -- and how that misrepresentation -- we
14 need to know. I know your Honor may disagree whether or not
15 the use of a quarter of a million dollars into the company
16 would have created a greater return, not just on the contract,
17 but on the relationship.

18 THE COURT: If that were the case, wouldn't you be
19 entitled to that greater return pursuant to the contract?

20 MR. BOHN: Yes, your Honor. But we are also alleging
21 that the underlying fraudulent misrepresentations and then the
22 fraudulent use of the moneys could very well affect the
23 damages.

24 THE COURT: I am only going to discuss this in terms
25 of, if I do dismiss these claims, whether or not, if I give you

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1 an opportunity to put that in your complaint, it wouldn't be
2 futile to attempt to amend.

3 MR. BOHN: That is certainly an alternative, your
4 Honor, your Honor, that we're willing to do.

5 THE COURT: But the reason why I raised that is
6 because I went back to Mr. Cohen's declaration, in which he
7 attaches the agreement. It has a merger clause: "This
8 agreement represents the full, complete, and entire agreement
9 between the parties hereto and supersedes all other agreements
10 between the parties."

11 And the modification language: "This agreement shall
12 not be supplemented, amended, or modified unless done in
13 writing and executed by all parties thereto."

14 So wouldn't that necessarily mean that everything that
15 your client was promised and reasonably relied upon is supposed
16 to be in this agreement?

17 MR. BOHN: The roster is part of the agreement, your
18 Honor.

19 THE COURT: OK.

20 MR. BOHN: To your point, it is attached.

21 THE COURT: OK.

22 MR. BOHN: So if that roster or any representation of
23 the people on that roster was made prior and then made part of
24 the -- he can't cure a misrepresentation by putting it into the
25 agreement I respectfully say.

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1 THE COURT: OK.

2 Again, I am just not sure what you say that you can
3 get from Mr. Cohen personally as opposed to what you are
4 entitled to get as damages under the contract.

5 MR. BOHN: Well, we do allege that there were injuries
6 to Mr. Mass' credit ratings.

7 THE COURT: Because of what?

8 MR. BOHN: Because of this agreement.

9 THE COURT: Right. I am not sure --

10 MR. BOHN: Because of his entry into the agreement.
11 Because he was induced to enter into that agreement, he lost
12 the use of money. He had credit issues.

13 THE COURT: Yes. But that would have been the
14 consequence of this agreement whether they breached or not,
15 wouldn't it?

16 MR. BOHN: No. The breach is separate, your Honor.

17 THE COURT: How did they ruin his credit?

18 MR. BOHN: Well, because he didn't have the money. He
19 had to start borrowing.

20 THE COURT: He didn't have the money to do what?

21 MR. BOHN: For basic -- you know, I would obviously
22 want to engage in more discovery on it, but --

23 THE COURT: I know, but when he gave him the money he
24 didn't have the money.

25 MR. BOHN: When gave him the \$250,000, he lost the use

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1 of the money for other purposes.

2 THE COURT: But he knew he was going to lose the use
3 of the money. That's why he gave it to him.

4 MR. BOHN: But he also expected to get returns on
5 that, which he hasn't, which I know your Honor will say doesn't
6 that go back to the breach of contract. I would respectfully
7 say that the inducement in order to get him into it is a
8 separate wrong because of the misrepresentations.

9 THE COURT: I guess my view finally is you have to
10 explain to me what's the difference between those two fraud
11 counts. I don't see that your factual allegations are any
12 different, and I'm not even sure what theory, if it's not a
13 fraudulent inducement theory, I'm not sure what the second
14 fraud theory that you are alleging with regard to fraud legally
15 being defined as a material misrepresentation that your client
16 relied upon.

17 What is the different material misrepresentation that
18 your client relied upon that caused him damages in Count Six
19 that is different from what's Count Five?

20 MR. BOHN: Obviously, your Honor, there is a bit of
21 pleading in the alternative here which we originally filed in
22 state court. Of course, the obligations are still there. We
23 believe that the fraud as to the inducement would be any
24 promises, for example, the roster.

25 THE COURT: Right.

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1 MR. BOHN: That caused him to enter into the
2 agreement.

3 THE COURT: OK.

4 MR. BOHN: To a certain extent that could also be
5 supported by our argument that his intent was never to utilize
6 the money for the company. As to the fraud, it would more so
7 boil down to the misuse of those funds which Mr. Cohen knew he
8 was taking from Mr. Mass and then used for those other
9 purposes, a fraudulent use of that money by Mr. Cohen.

10 THE COURT: When you say fraudulent use, you're using
11 "fraudulent" not in its legal sense. You're using it in some
12 generic sense. That's just bad conduct. That technically is
13 not a fraud. A fraud is you made me part with my money by
14 lying to me. That's a fraud. I mean, if we were to talk about
15 it in layman's terms, that's the legal essence of a fraud.

16 I understand you are saying to me that -- two things,
17 that you made me lose money because I gave you the money,
18 because you promised to give me these profits or, if you say
19 that I want to allege -- I mean I intended to allege that I
20 gave you my money because you told me you had a roster of
21 people and you really didn't have that roster, but I don't
22 understand what a separate fraud is with regard to -- well,
23 let's put it this way. There's no such thing as two different
24 frauds, one being a fraudulent misrepresentation and another
25 being a fraud. There's just no such separate count.

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1 MR. BOHN: Understood, your Honor.

2 THE COURT: There's no such separate legal count. A
3 fraud is a fraudulent misrepresentation. If it's not a
4 fraudulent misrepresentation, it's not a fraud. It may be a
5 theft. It may be a breach of contract. It may be a securities
6 fraud -- I won't say securities fraud, but it may be something
7 else.

8 Unless you can explain it to me, I can't accept that
9 there's one thing that's called a fraudulent misrepresentation
10 and that there is a separate thing called an actual fraud.

11 MR. BOHN: Perhaps it's inarticulately titled, but the
12 concept would certainly be towards the fraudulent
13 misrepresentation, be it the roster, the use of the funds.

14 One other point, your Honor, that you are making, it's
15 a good one, as to what the conduct was. Well, he gave him the
16 money. He can do whatever he wants with it. I think the
17 distinction on this one is that Mr. Mass was purchasing or
18 obtaining a stake in the promotional profits, not in the
19 company itself.

20 THE COURT: Right.

21 MR. BOHN: But in the promotional profits, which is a
22 little bit different than maybe --

23 THE COURT: But he didn't have any guarantee that it
24 was necessarily going to make a profit.

25 MR. BOHN: No, he certainly did --

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1 THE COURT: I understand. You say that he had the
2 right to --

3 MR. BOHN: But he did have a reasonable belief or a
4 reasonable basis to believe that the money would be utilized
5 for GCP.

6 THE COURT: I know, but that is true in every
7 contract.

8 MR. BOHN: Right.

9 THE COURT: That doesn't define it as a separate
10 fraud? Inherent in a contract is that the money would be used
11 for a legitimate purpose, not necessarily. I guess that's not
12 inherent in a contract. Quite frankly, it's not necessarily
13 inherent in this contract.

14 What is inherent in this contract is that in good
15 faith whatever profits were made that he would get 25 percent
16 of them. But I am not sure you can argue that, well, I entered
17 into a contract to get 25 percent of the profits, and after I
18 did that, they decided that, for whatever reason, that they
19 didn't want to make a profit this year. Do I have the right to
20 tell them that you have to make that profit?

21 View it in this context: If I know that there's a
22 fight that you can promote and that it would generate profits
23 and I would be entitled to 25 percent of those profits, is
24 there something about this contract that forces them to do that
25 promotion?

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1 MR. BOHN: Nothing in the plain language. But to go
2 back to your Honor's point, I believe that would be implicit in
3 any contract.

4 THE COURT: Right. It's implicit in a contract, and
5 it would be consequential damages for the breach of that
6 contract. But, as you sort of acknowledged by dropping the
7 good faith and fair dealing, it may be a claim of good faith,
8 you know, that they violated their covenant of good faith and
9 fair dealing, but the problem that I have is that you want to
10 say that -- is it your theory that even if you -- I guess I
11 have to back up, because I don't remember your answer to this.
12 Is this count solely against Cohen.

13 MR. BOHN: Yes.

14 THE COURT: These two fraud counts, not against the
15 company.

16 MR. BOHN: Correct.

17 THE COURT: All right. I have never seen a
18 circumstance -- and if you've cited a case that stands for that
19 proposition I would like to see it -- but I have never seen a
20 circumstance where someone enters into a contract with a
21 company, the company doesn't perform the obligations under that
22 contract, and so the person can get to sue the company for
23 breach of contract and sue the individual who signed on behalf
24 of the company in fraud.

25 MR. BOHN: It is pled against defendants. The conduct

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1 is Cohen's. To the extent that Mr. Cohen as president -- I
2 believe that's his title -- conduct is imbued upon the
3 corporation, then it would be asserted against both. My answer
4 certainly was -- my understanding was, you know, whose conduct
5 are we talking about? And it would be Mr. Cohen's.

6 THE COURT: What I'm asking you is very technical.
7 When I give this case to a jury, am I going to ask the jury
8 whether or not the company is liable for fraud?

9 Are you asking for that kind of determination and a
10 statement to the jury that you are to decide whether the
11 company is liable for fraud and whether or not you are going to
12 give money damages against the company because they committed
13 fraud?

14 Are you bringing this count against the company?

15 MR. BOHN: At this point the count is being brought
16 against both defendants, yes, your Honor. I think I
17 misunderstood your question earlier.

18 THE COURT: All right.

19 MR. BOHN: Obviously, I am distinguishing it from
20 Counts One and Two, which is solely against the company.

21 THE COURT: That's why I asked you, because that is
22 important.

23 MR. BOHN: Yes.

24 THE COURT: Because I don't see that. I don't see
25 that in the complaint.

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1 MR. BOHN: Don't see what, your Honor?

2 THE COURT: I don't see this allegation or this count
3 being asserted against the company.

4 MR. BOHN: The fraud count. It says Cohen acting on
5 behalf of GCP --

6 THE COURT: Where you reading from?

7 MR. BOHN: For example, paragraph 81.

8 THE COURT: All right. So you are saying that by this
9 language you are alleging a claim for breach of contract
10 against the company and a claim for fraud against the company?

11 MR. BOHN: Both of them, yes. Fraud against both
12 defendants.

13 THE COURT: I didn't think that is what you were
14 discussing. You think that legally you can do that?

15 MR. BOHN: That is our assertion at this point, your
16 Honor. It may not pan out.

17 THE COURT: Based on these facts?

18 MR. BOHN: Based on these facts.

19 THE COURT: The representations you say are made by
20 Cohen are one thing, but the representations that you have here
21 that are made by the company through Cohen is exactly the
22 contract. You don't say that they made any other -- as a
23 matter of fact, you don't even say here even Cohen made any
24 other representation other than what is in the contract. But
25 here at least Cohen is a person you are not suing for the

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1 breach of contract.

2 MR. BOHN: Correct.

3 THE COURT: But GCP you are suing for the breach of
4 the contract, and you are saying that the same facts that
5 constituted the breach of contract are the facts on which you
6 are separately suing them for fraud.

7 MR. BOHN: The breach of the contract is the failure
8 to pay. The fraudulent statements, the roster and others, were
9 made before that. I believe that's a distinction, your Honor.

10 THE COURT: Isn't that the same thing?

11 MR. BOHN: I don't believe so, your Honor. I think
12 the breach -- as you were pointing out before, let's say they
13 didn't make misrepresentations and the profits were generated
14 and not paid. You would still have your breach of contract
15 claim.

16 The distinction I am making is between the breach for
17 failure to pay and the representations made prior to entry of
18 the contract with Mr. Mass. As a matter of law perhaps the
19 fraud doesn't go forward against the corporation and it does
20 against Cohen. But we're simply making our --

21 THE COURT: That's one of the reasons why I went back
22 to the agreement.

23 MR. BOHN: OK.

24 THE COURT: Because the agreement clearly for the
25 parties in the agreement says this is the entire project.

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1 There is no reasonable reliance on --

2 MR. BOHN: The merger clause, yes.

3 THE COURT: Right.

4 -- some other additional promise that is not in the
5 agreement, because the agreement is the promise. That's why
6 you put a merger clause in. You don't want the parties to say
7 later on you promised me something more or different than
8 that's in the contract.

9 Again, the promise was that he would get 25 percent of
10 the promotional profits for the purpose of returning the
11 \$250,000 investment, and an additional 5 percent of the
12 promotional profits as payment on his financial interest in the
13 promotional profits. That's exactly what is in the contract.

14 MR. BOHN: Thank you.

15 THE COURT: Thank you.

16 You want to respond?

17 MR. SAPONARA: Just three minor points.

18 THE COURT: Sure.

19 MR. SAPONARA: I just want to get back to what is
20 exactly in the complaint. Mr. Bohn referenced damage to
21 Mr. Mass' credit rating.

22 If you go to paragraph 37, it says that was caused by
23 the failure to pay salary.

24 THE COURT: I'm sorry. Excuse me. You keep saying
25 "paragraph," and you are confusing me.

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Paragraph 37 of?

MR. SAPONARA: The complaint.

THE COURT: The complaint. Not the brief. Paragraph 37.

OK. "Additionally the failure of GCP and Cohen to pay Mr. Mass' salary has caused damages to his credit rating and his ability to finance business and personal affairs."

MR. SAPONARA: I just wanted to clarify the representation was that this had something to do with, the credit score damage had something do with the investment agreement. That is not what the complaint says. It says that it's based on the failure to pay the salary.

THE COURT: Right.

Is the salary part of the investment agreement?

MR. SAPONARA: It is not.

THE COURT: OK. So that's not this claim?

MR. SAPONARA: Yes.

I want to talk about the roster because the word "roster" shows up once in this entire complaint. It's in paragraph 15.

THE COURT: OK. Paragraph 15.

MR. SAPONARA: All that paragraph does is explain in summary what promotional profits are. There are no allegations in this complaint that the roster was misrepresented, that there were additions to it, that there were subtractions from

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1 it. It's just not a basis it is not alleged to have been a
2 representation either in connection with the contract or the
3 actual schedule of members of the roster, whether that's
4 incorrect, or that Mr. Cohen made a representation that if you
5 give me \$250,000 I can go sign Floyd Mayweather, and that that
6 was the reason that he entered into the contract.

7 I think this flows into my third point, which is this
8 isn't a situation where Mr. Cohen has all the information in
9 his head. So I don't think it is appropriate to give an
10 opportunity to replead here.

11 Mr. Mass worked for the company from April 2015 to
12 February 2018. If he got there in April of 2015 and said the
13 roster isn't what it was represented to me to be, he would know
14 that. He could have alleged that.

15 If the roster ended up being different over the course
16 of his nearly three-year employment, he could have alleged that
17 in this complaint.

18 There's no new facts that he could have discovered or
19 that he could not have pled when he brought this original
20 complaint. Misrepresentations have to be pled specifically.
21 You have to say when, where, and what. So there's nothing in
22 here that Mr. Cohen and Mr. Mass met in February of 2015
23 outside Madison Square Garden and Mr. Cohen said X, Y, Z. That
24 is not in here. There is no detail whatsoever with respect to
25 the roster with respect to any representations other than what

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1 is in the agreement.

2 I don't think it would be appropriate here to give an
3 opportunity to take another crack at pleading fraud under these
4 circumstances.

5 THE COURT: I am just curious. What is the status of
6 the company at this point. Is it still an ongoing company,
7 Mr. Mass just left, or it's no longer --

8 MR. SAPONARA: The company is still operating.
9 Mr. Mass has just left.

10 THE COURT: How many people work at this company?

11 MR. SAPONARA: I believe there is a handful of
12 employees and people that he works with in the industry.
13 Whether they are affiliates or partners that don't actually
14 work for the company, there was a lot of situations where
15 they'll have co-promotional agreements where two separate
16 companies will jointly promote a single boxer.

17 THE COURT: As opposed to permanent ongoing employees?
18 It was just Mr. Cohen and Mr. Mass and the secretary?

19 MR. SAPONARA: I know there is a bookkeeper. I think
20 it's a handful of employees.

21 THE COURT: Again, handful would mean that. I would
22 have to count my fingers. It may mean something else.

23 MR. SAPONARA: I'm confident it's fewer than ten. I
24 don't know the exact number.

25 THE COURT: All right.

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1 MR. SAPONARA: Thank you, your Honor.

2 THE COURT: I am going to go ahead and dismiss the
3 fraud claims. I am going to dismiss it on two bases. One, if
4 the fraud claims are intended to be alleged against the
5 company, that is not clearly alleged here. It doesn't clearly
6 accuse the company of fraud. But, even if it did, with regard
7 to the company, there is a direct contract here between the
8 company and the plaintiff. The only allegation in this
9 complaint in support of an actual fraud as alleged in Count Six
10 or fraudulent misrepresentation as alleged in Count Five, the
11 only actual promise that is alleged in support of those counts
12 is the actual obligation that is in the contract.

13 It isn't alleged that any other statement that was
14 made to the defendant fraudulently induced him to enter into
15 the contract nor is it alleged that there was some other
16 representation that was before the contract, when the contract
17 was signed, in the contract, or even subsequent to the contract
18 that the plaintiff affirmatively relied upon with regard to the
19 company and its obligations. They are the exact same
20 obligations that are laid out in the contract, and therefore,
21 an obligation to live up to the obligations as they are laid
22 out in the contract with regard to payment and with regard to
23 promotional profits that Mr. Mass would be entitled to.

24 So, based on, one, the lack of factual allegations
25 against the company in the complaint, even if there wasn't a

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1 contract, but additionally based on the fact that there is a
2 written contract that the plaintiff has obligations and rights
3 and the defendant has obligations, GCP has obligations under
4 that contract, that additionally would preclude suing the
5 company based on these facts for breach of contract and suing
6 the company for fraud based on the same promises that were
7 alleged in the complaint.

8 With regard to Mr. Cohen, Mr. Cohen is a signatory,
9 but he is not the contracting party. The company is the
10 contracting party. He is not being sued in contract based on
11 that investment agreement or any another agreement. The
12 representations that were made in the contract, the obligations
13 in the contract that are attributed to him on behalf of the
14 company are what is relied upon in this complaint as a fraud.

15 Again, I see no separate fraud with regard to
16 fraudulent misrepresentation and actual fraud. The only theory
17 of fraud, actual fraud or fraudulent misrepresentation in this
18 case is that Mr. Cohen made certain representations that
19 Mr. Mass relied upon, and he suffered damages because he relied
20 upon it. The way he relied upon it is that he entered into the
21 contract and put up \$250,000 and didn't get his \$250,000 and
22 promotional profits.

23 First of all, that is not a representation of fact.
24 It is not even a representation of some current condition of
25 the company. I understand separately a theory, although I'm

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1 not convinced that one could articulate it here, but I
2 understand at least a theory that if he made certain promises
3 about who was in the stable of fighters and those turned out to
4 be false and he suffered additional damages that are personally
5 recoverable outside of the contract with GCP and recoverable
6 from Mr. Cohen, I would understand that theory.

7 But at this point that's not what the complaint says.
8 The complaint does not say, and there is obviously law to
9 support a position that if I say to you invest in my company
10 and I have ten trucks that are going to make us a big profit,
11 you can't sue me if we don't make a big profit, but you might
12 be able to sue me for fraud if it turns out I don't have ten
13 trucks.

14 In this that case that's not what the complaint says.
15 I am going to dismiss the fraud claims without prejudice to you
16 if you think you can overcome and you can replead and you wish
17 to attempt to request that you be allowed to file an amended
18 complaint. If I see that application with a letter explaining
19 to me what you have done and attaching a proposed amended
20 complaint and there aren't any serious motions to dismiss --
21 the other side can respond to that and tell me whether or not
22 that's futile or not -- I will give you that one opportunity.

23 But, based on the facts as have been asserted, I don't
24 have any confidence that you will be able to, one, allege two
25 separate frauds, two, even allege a separate fraud against

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1 Cohen or the company, being able to assert reasonable reliance
2 on facts that would constitute a fraudulent inducement by the
3 company. I don't know what Mr. Cohen represented to Mr. Mass
4 with regard to something that he could reasonably rely upon.

5 I will give you that opportunity, but at this point,
6 reading the complaint, relying solely on the fact that
7 Mr. Cohen falsely represented that they were going to make
8 payments to him, that is not a sufficient basis for a separate
9 fraud claim against either Mr. Cohen or the company.

10 It is a sufficient basis for a breach of contract, for
11 not living up to that promise. The case law is clear that you
12 can't convert a breach of contract into a separate fraud claim
13 by simply alleging that what they promised me in the contract
14 they didn't perform or what they promised me in the contract
15 when they signed the contract, they never intended to perform.
16 What you must do is specifically articulate what
17 representations were made that you can independently
18 demonstrate were false at the time and that one would have not
19 reasonably gone forward with this agreement had one known the
20 true facts that were different than they were when you signed
21 the contract.

22 I understand the defendants haven't attempted at this
23 stage of the proceeding to attack the Count One and Count Two
24 with regard to the breach of contract claims and the
25 contract-related claims against the company that signed the

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1 contract and the failure to pay the wages. If they promised to
2 pay him promotional profits, to the extent that the contract
3 made that promise and those profits weren't paid, then the
4 defendant would be in breach of contract and liable for any
5 damages that are calculable under the formula, and, pursuant to
6 the contract, entitled to interest, costs, and attorney's fees
7 as laid out in the contract.

8 With regard to Count Two, that the defendant was
9 employed and entitled to a salary during this period of time
10 and that salary was unjustifiably not paid, then they would
11 further be in breach of contract to pay the salary and any
12 damages and any other consequential damages if they are
13 appropriate pursuant to the employment.

14 At this point I will dismiss the fraud claims, Counts
15 Five and Six.

16 If the plaintiff wishes to attempt to amend, you can
17 submit that within the next 30 days. Otherwise we will move
18 forward with the contract claims. I will review that right
19 away and respond to it right away if that's where we're going
20 to go.

21 Otherwise, given what we discussed, Count Five will be
22 dismissed, Count Six will be dismissed without prejudice to
23 amend. Though, again, my position at this point is it appears
24 to me it's going to be futile, but I don't know all the facts.
25 If there are facts that can support a claim that is not

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1 asserted here or reassert it, then I will consider it.

2 Otherwise, those two counts will be dismissed.

3 The other counts we discussed will be dismissed
4 voluntarily, and Count Nine and Count Ten will be dismissed as
5 not being technically separate causes of action but without
6 prejudice to plaintiff to seek to either pierce the corporate
7 veil or seek attorney's fees and costs if there appears to be
8 evidence that piercing the corporate veil under the standard is
9 appropriate, if the facts warrant that, or, obviously pursuant
10 to the investment contract, the investment agreement that
11 attorney's fees and costs would be automatically recoverable
12 pursuant to the agreement.

13 The reason why that's important is because if there
14 were to be at the end of this case a genuine factual dispute,
15 an issue with regard to piercing the corporate veil and an
16 issue with regard to attorney's fees and costs, that is not a
17 jury issue. That is not an issue for the trier of fact. It is
18 an issue for the Court if the jury were to make other findings
19 of liability consistent with imposing liability pursuant to the
20 contractual obligation.

21 So I will issue an order consistent with that.

22 Again, I will give you an opportunity, once you look
23 at it further and consider whether you have further facts to
24 allege to support a fraud claim against either one of these
25 defendants as it's alleged now and whether or not you can have

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1 not just a factual basis to do so but a legal theory to do so,
2 that would not be precluded by the issues that we have
3 discussed today.

4 All right.

5 What I am going to do is I will do this. I will
6 schedule a conference for January. Mr. Bohn, if you intend to
7 attempt to amend, let them know as soon as possible so we can
8 anticipate that in the next 30 days; or, if you are just going
9 to move forward, then let's go ahead and move forward on the
10 contractual claims.

11 If you want the assistance of the magistrate judge or
12 mediation for settlement discussions, let me know, and I'll
13 refer you there in the first instance, to save you all time,
14 effort and expense.

15 But otherwise agree upon what is a reasonable schedule
16 for discovery and give me that by letter. I will set it down
17 for January 17 at 9:45. Before that time we will know from you
18 whether we are proceeding just on these counts, and I will know
19 what the schedule looks like that you have proposed and we can
20 see where we are on January 17 with regard to that schedule, if
21 we need to meet on that date, or I'll get a letter from you
22 before that telling me what the status is and asking me to
23 adjourn that date if that's appropriate.

24 As I said, just let me know if you want me to refer
25 you to mediation or the magistrate judge for settlement. I

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1 will address that request as soon as you make it. Otherwise,
2 start talking about moving forward with discovery. If for some
3 reason we are going to address an amended complaint, an attempt
4 to amend the complaint before that time, we can resolve that
5 quickly and know that we're moving forward by January 17.

6 All right. Is there anything else we need to address?

7 MR. SAPONARA: No.

8 MR. BOHN: Your Honor?

9 THE COURT: Yes.

10 MR. BOHN: Should we consider the dates in the current
11 CMO suspended pending what we'll go on with the pleadings?

12 THE COURT: No. Why don't you first discuss it and
13 agree to the extent that you can agree. I'll probably go along
14 with it. To the extent that you disagree, I'll resolve what
15 should be done depending on where we are and what you disagree
16 about.

17 MR. BOHN: Your Honor, we will affirmatively advise
18 the Court what the plaintiff will do the pleading either way as
19 soon as we can and at that point, depending on what that
20 decision is, we can set forth a CMO with some new deadlines.
21 Thank you.

22 THE COURT: Thank you.

23 MR. SAPONARA: Thank you.

24 THE COURT: Have a good day.

25 (Adjourned)